IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

FRIDAY, THE 25TH MAY 2007 / 4TH JYAISHTA 1929

CRP.No. 306 of 2005()

AGAINST THE ORDER DATED 17/02/2005 IN EP. 51 /2002 IN OS.87/1989 of SUB COURT, TIRUR

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REVN. PETITIONER: 2ND JUDGMENT DEBTOR, 2ND DEFENDANT:

K.K.BAVA, S/O.KUNJIPPU,A GED 47,
KALLIKKATTIL HOUSE, EDAPPAL P.O.
MALAPPURAM.

BY ADV. SRI.SHOBY K.FRANCIS

RESPONDENTS: DECREE HOLDER & IST JUDGMENT DEBTOR/PLAINTIFF & IS

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1. M/S.MASTER LINK LEASING & FINANCE LTD.,
JOBS SHOPPING COMPLEX, WADAKKANCHERRY ROAD,
KUNNAMKULAM, THRISSUR DISTRICT.

2. V.P.ABDUL RAHIMAN, S/O.ALAVI,
VATTAPPARAMBIL HOUSE, EDAPPAL P.O.
MALAPPURAM DISTRICT.

3. P.K.MOIDEEN, S/O.ALI, PONNAMKALATHIL
HOUSE, EDAPPAL P.O. MALAPPURAM DISTRICT.

BY ADV. SRI.G.HARIHARAN
SRI.PRAVEEN.H.

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 25/05/2007, ALONG WITH CRP NO. 333 OF 2005 THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

PIUS.C.KURIAKOSE. J.

C.R.P Nos. 306 & 333 of 2005

Dated this the 25th day of May 2007

ORDER

These civil revision petitions filed respectively by the second and the first judgment debtor in a proceedings initiated by the respondent for execution of a money decree which they had obtained against the revision petitioners. The learned Sub judge by the impugned order has directed issuance of arrest warrant against the revision petitioners, after repelling the contentions of no means and no willful negligence raised by them.

2. I have heard the submissions of Mr. Shoby K.Francis and Mr. P.Chandrasekhar learned counsel for the revision petitioners and also those of Sri. G.Hariharan learned counsel for the respondents. The evidence before the court below consisted of the oral testimony of PW1 who was examined on behalf of the respondents and also documents A1 to A3 on the side of the respondents and B1 to B2 on the side of the petitioner in C.R.P No.306/2005. The submission of Mr. Shoby K.Farncis counsel for the petitioner in C.R.P..306/2005 that the evidence is insufficient to hold that his client the 2nd judgment debtor was possessed of sufficient means has some force. In the affidavit submitted by PW1 in lieu of his chief examination, there is no specific case that the petitioner in C.R.P 306/2005 is possessed of any asset. The details of the sources of income are also not given. However in the cross- examination It is

seen that PW1 was cross examined only with respect to availability of immovable properties,and not regarding income. The initial burden as rightly submitted by the learned counsel for the petitioners was that of the respondent/ decree holder to establish by evidence that the judgment debtors possessed sufficient means to pay the decree debt in lump or substantial portion of it and that they will be willfully negligent in the mater of making payments. I do not think that at least in the case of the petitioner in C.R.P. No. 306/2005 the said burden has been discharged by the respondent . But as noticed earlier the petitioner in C.R.P 306/2005 did not specifically cross-examine PW1 on his averments in the affidavit that the said petitioner is also having income. .In the case in C.R.P 306/2005 the learned Sub judge has noticed that the circumstances he stood as surety vindicates his financial capacity to pay the decree debt. The above approach was certainly unrealistic. The case necessarily has to go back to the court below in so far as it relates to the petitioner in C.R.P 306/2005

3. In the case of the petitioner in C.R.P 333/2005 the learned Sub Judge has noticed that the petitioner did not adduced any evidence to establish his contention that the Maruthi Car referred to in the order was sold by him. It is on that basis alone, that it is found that the petitioner is having sufficient means to pay the decree debt. Mr.P.Chandrasekhar learned counsel submitted that the car stands hypothecated to financiers. Ext.A1 itself will reveal that the Maruthi car is hypothecated to Ponnani

Service Co-operative Bank which means that it will not be possible for the petitioner to dispose of the car without reference to the financiers. But in this case also I find that the petitioner in C.R.P. No. 333/2005 has not chosen to adduce even formal counter- evidence. Since the case is going back to the court below, I direct that the learned Sub-judge will take a fresh decision after affording opportunity to both the petitioners to adduce counter- evidence. The learned Sub judge will appreciate the entire evidence which comes on record and enter specific findings as to whether the petitioners have had sufficient means to pay the decree debt in lump or the substantial portion of the decree debt or willfully negligent in the matter of discharging the decree debt

4. Subsequent to interim orders the petitioner in C.R.P 333/2005 has paid total amount of Rs. 15,000/- towards the decree debt. Similarly by the interim order passed in C.R.P 306/2005 the petitioner remitted Rs. 5,000/- The remittance in C.R.P 306/2005 is specifically made without prejudice to the contentions of the petitioner In that case.

5. Notwithstanding the cancellation of the impugned order and the order of remand, I direct that the petitioner in C.R.P 306/2006 shall remit without prejudice to his contention at the rate of Rs. 1,000/- per mensem on the 15th of every month commencing from 15-06-2007 till fresh orders are passed. I also direct the petitioner in C.R.P 333/2005 to

remit within three weeks from today a sum of Rs. ,000/- towards the decree debt without prejudice to his contentions. The learned sub-judge will pass fresh orders at the earliest at any rate within 3 months of receiving a copy of this order. It is made clear that the petitioners will forfeit the benefit of this order if they default in making payments as above and that under such an event the court below will be justified in directing arrest of both of them.

Allowed as above. No costs.

PIUS.C.KURIAKOSE, JUDGE

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